

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

REESA G. SCHMID)	
Claimant)	
V.)	
)	
IHOP #2108)	
Respondent)	
AND)	
)	
NATIONWIDE MUTUAL)	
INSURANCE COMPANY)	
Insurance Carrier)	

Docket No. 1,072,872

ORDER

Claimant, through counsel, Stanley R. Ausemus, requested review of Administrative Law Judge Pamela J. Fuller's June 3, 2015 preliminary hearing Order. Respondent and insurance carrier (respondent) appear by counsel, David J. Bogdan.

ISSUES

On January 5, 2015, claimant slipped on ice when she was at respondent's location to obtain her paycheck. The judge denied claimant's request for payment of medical bills and medical treatment after concluding claimant did not sustain personal injury by accident arising out of and in the course of her employment and did not prove she needed medical treatment.

Claimant argues injuring herself at her place of employment while trying to get her paycheck is compensable. Claimant requests the Board order respondent to pay her medical bills and provide medical treatment.

Respondent argues claimant's decision to travel to respondent on her day off to pick up her check was personal in nature and not causally connected to performing her job. Respondent notes claimant simply could have picked up her check when she was scheduled to work on January 7, 2015. Respondent contends claimant failed to establish her alleged accident arose out of and in the course of employment and requests the Board affirm the decision.

The only issue is: did claimant sustain an injury by accident arising out of and in the course of her employment?

FINDINGS OF FACT¹

Claimant began working for respondent as a waitress on December 15, 2014. Claimant was scheduled to be paid on January 2, 2015, but payroll was late due to a holiday. Claimant called respondent on January 3 and 4, days she worked, and learned her check was still not available. Claimant was anxious to get paid.

Claimant was not scheduled to work on January 5 and was not on duty. She called respondent about 1:00 or 1:15 p.m. and spoke to Oscar, the general manager's son, to see if her paycheck was ready. He told claimant her check was available and she could come pick up her check. Claimant acknowledged it was her personal decision to pick up her check on January 5 and respondent did not mandate she pick up her check that day, but she needed the money to pay bills and rent and she did not want to wait for her next scheduled day to work, January 7, to pick up her check.

Claimant arrived at the restaurant at 1:30 p.m., parked her car in the parking lot where customers would park. It was not snowing at that time, but it was snowing off and on and the parking lot was very icy and not cleared of accumulated precipitation. She walked in the front doors and went to the office to ask for her check. General Manager, Angela Diaz, told claimant she could not have her check until after the lunch hour and to come back after 2:00 p.m. Claimant indicated she had never before been told she could not get a check until after 2:00 p.m. In any event, claimant left, and when stepping off the sidewalk onto the parking lot, her right foot slipped or went out from under her and she landed hitting her hand, wrist and elbow. Claimant went home, which was about five minutes away by vehicle, and returned to respondent at 2:00 p.m. and got her check.

While claimant was scheduled to work on January 7, she had a lot of pain and could not use her hand. Claimant called respondent and told a night manager she was going to the emergency room and she would not be at work. The night manager told claimant to bring in a doctor's note. Claimant went to the emergency room and the doctor told her to stay off work two days, but did not give her any restrictions.

On January 10, 2015, claimant brought in an off work slip. Ms. Diaz told claimant she would need to take a urinalysis test (UA). Claimant indicated she was willing to take the UA. Claimant testified when she arrived for work on Sunday, January 11, 2015, she clocked in and went to the office to take the UA, but Ms. Diaz told her she was not needed and to go home. Claimant did not work after the fall.

¹ All facts are based on claimant's testimony, other than an affidavit from respondent's General Manager, Angela Diaz.

Respondent presented an affidavit of Ms. Diaz stating:

- claimant's employment was terminated January 3 and she was not an employee on January 5
- employees are paid biweekly and may pick up their checks on their next shift following a pay period
- alternatively, an employee will be mailed a check if the employee does not pick up the check within a week
- while "not recommended," an employee is allowed to pick up a check "on their own time, after 2:00 pm, following issuance of the check."

Claimant disputed the accuracy of Ms. Diaz's affidavit because she worked January 3 and 4, was paid for those days and was not terminated until January 10 or 11.

Claimant continues to have problems with her hand. Claimant's pain is in her right hand from her ring finger and middle finger radiating up into her elbow. Her ring finger locks and burns. The pain sometimes goes into her shoulder. Claimant returned to the emergency room on May 15, 2015, because she was in a lot of pain.

The preliminary hearing Order stated, in part:

The claimant is requesting payment of outstanding medical bills and medical treatment. The claimant believes that *Mendoza v. DCS Sanitation*, 37 Kan. App. 2d 346 should be relied upon to determine if the claimant's accident arose out of and in the course of employment. In the *Mendoza* case, it was found that the claimant's trip to pick up his paycheck was a business mission or work-related errand that was integral to the employment because the employer directed employees to pick up paychecks at a location separate and apart from the workplace. This scenario can be distinguished. Here, the claimant was not required to go to a separate location from where she worked. She was not required to go pick up her paycheck. She could have picked it up at her next shift or if not picked up within a week, it would have been mailed to her. After her termination, she did receive a paycheck in the mail. By the claimant's own admission, she was not working the day of the accident. Using the rationale for the "going and coming" rule, the claimant was subjected only to the same risks or hazards which other patrons were subjected and it was by her own choice, to go get her paycheck. She was not directed to by her employer.

Based on the evidence presented, the claimant did not meet with personal injury by accident arising out of and in the course of her employment. Her request for payment of medical bills and medical treatment should be and the same is hereby denied. It should be noted that the claimant has also failed to prove that she is in need of any medical treatment for any injuries sustained in her fall.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee for personal injury by accident arising out of and in the course of employment. Claimant must prove her right to an award based on the whole record using a “more probably true than not true” standard.²

K.S.A. 2014 Supp. 44-508(f)(3)(B) states:

The words "arising out of and in the course of employment" . . . shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer

In *Mendoza*,³ the Court of Appeals determined that a trip to pick up a paycheck was a work-related errand or special purpose trip where the employer directed the employee to pick up a paycheck at a location separate and apart from the workplace. In *Palmer*,⁴ the employee, whose check was delayed due to weather, was directed to pick up her paycheck on a day and time in which the business was not open to the public. While she was not “on the clock,” a personal injury suffered on the employer’s premises when she picked up her paycheck at the designated time was held compensable because the payment of wages is part of an employee’s relationship with employers.

ANALYSIS

Palmer and *Mendoza* control and do not contain distinctions amounting to any real difference. Claimant’s check was late and respondent told her to come and get it three days after it was due. She was not initially told to wait until after 2:00 p.m. Whether claimant *could have* picked up her check when her next shift began on January 7 or *could have* waited for it in the mail is of little consequence; she was still allowed to come get her check and she was not violating her employer’s policies by so doing.⁵

² K.S.A. 2013 Supp. 44-501b(c) and K.S.A. 2013 Supp. 44-508(h).

³ *Mendoza v. DCS Sanitation*, 37 Kan. App. 2d 346, 152 P.3d 1270 (2007).

⁴ *Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 59 P.3d 352 (2002).

⁵ See *Webb v. Rose Villa, Inc.*, No. 1,047,270, 2012 WL 2890460 (Kan. WCAB June 4, 2012). Respondent’s argument that claimant could have picked up her check when her next shift began on January 7 is peculiar because Ms. Diaz contended claimant was fired on January 3. Generally, terminated employees do not report to work after being fired.

It matters not that claimant sought her check at her normal place of work, instead of an offsite location, as in *Mendoza*. Such case does not state an employee's injury while directed to pick up a check at a normal work location is not compensable. This Board Member does not believe it matters if respondent's location was open to the public when claimant's accident occurred, as was the case in *Palmer*. Such case does not say an employee's injury while picking up a check during normal business hours and while a respondent is open to the public is not compensable. Claimant was trying to pick up her paycheck, a work-related function she did not share with customers. Quite simply, neither *Mendoza* nor *Palmer* illustrate what is *not* compensable when a worker is directed to come to an employer's premises to obtain a paycheck.

Additionally, the going and coming rule does not apply. Claimant was not injured going to or coming from work. Rather, she was on respondent's premises and K.S.A. 2014 Supp. 44-508(f)(3)(B) states such fact nullifies such defense. *Palmer* indicates an employee picking up a paycheck is part of the employee-employer relationship, even if a worker is not scheduled to work or is being paid at the time of injury. *Arguendo*, even if the going and coming rule applied, an employee's trip to the employer to get his or her paycheck is "squarely within the recognized work-related errand exception to the going and coming rule"⁶ Respondent should not be permitted to delay claimant's check and then paint claimant's decision to get paid as a personal endeavor which renders her accidental injury non-compensable. Employers paying employees is part of the "'business' of employment" in Kansas,⁷ not a personal matter.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member reverses the preliminary hearing Order. Claimant's accidental injury arose out of and in the course of her employment. It appears the judge denied medical treatment and payment of medical bills based on lack of compensability. As such, this matter is remanded for the judge to address such requests.

WHEREFORE, the undersigned Board Member reverses and remands the June 3, 2015 preliminary hearing Order.⁸

IT IS SO ORDERED.

⁶ *Mendoza*, 37 Kan. App. 2d at 351.

⁷ *Id.*; see also *Palmer*, 31 Kan. App. 2d at 2.

⁸ By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

Dated this _____ day of August, 2015.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Pamela J. Fuller, Administrative Law Judge